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Mem^o Gilbert Laurie & Co

[Lord JUSTICE-CLERK Reporter.]

October 24. 1770. *Duke Hamilton*

MEMORIAL

FOR

GILBERT LAURIE of Polmont, Esq; and others, in the process of division of the muirs of Reddingrig and Whitfiderig,

AGAINST

The Duke of HAMILTON, and his Tutors.

7th Feby 1771

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As the question which is the subject of the present memorial, will fall to be reported to the court by the Lord Justice-Clerk Ordinary, at the same time that he reports a question betwixt the Duke of Hamilton and Mr Robert Hunter, touching his interest in the commonities of Reddingrig and Whitfiderig, which is the subject of a separate memorial; and as in that memorial, the facts that gave rise to the present question, as well as the proceedings in this process of division, are fully stated, it will be unnecessary to trouble your Lordships with resuming them here.

Your Lordships will from thence observe, that the different heritors claiming an interest in this commonry, were considered to be comprehended under three different classes. The first class comprehends those who derived their feu-rights from the abbots of Holyroodhouse. The second contains those who derived right from the family of Hamilton, subsequent to the general feu by the abbots to the Duke of Chastellault in 1552, whose feu-rights contain a grant of their several lands; with parts and pertinents; and also the Duke of Hamilton for his property-lands not feued out. And the third class consists of the rest of the fevers of the family of Hamilton, whose titles contain an express grant of an interest in the muirs, by a clause generally conceived in the following terms: "With parts, pendicles, and pertinents; together with the passage of cattle, and privilege of commonry, within the bounds of the common muir of Reddingrig, and Whitfiderig, conform to old use and privilege belonging to

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" the said lands; and all other liberties and commodities used and wont."

It is already established by a judgement of your Lordships, that those of the *first* and *second* classes have a right of common property in the said muirs, effeiring to their respective lands, and are intitled to a share in the division, according to the valued rent thereof. But as to these in the *third* class, your Lordships have found, " That the defender Gilbert Laurie, as deriving right from David Livingston, is not to be considered as a joint proprietor, but is only intitled to be continued in possession of his servitude, till such time as a share shall be set off to him sufficient to answer the servitude: And find, That the whole other defenders, who are *in pari casu* with the said Gilbert Laurie, are in like manner to be continued in possession of their respective servitudes, until such time as shares shall be set off to them as aforesaid: Find it proved, that the tenants and possessors of the lands of Hill of Polmont, Nether Mumerals, Beg's possession, Near-Bowhousemill, Maryflats, and Seggyhole, being all parts of the barony of Abbotskerse, have immemorially possessed the muirs of Reddingrig and Whitefiderig, as part and pertinent of their respective farms: And therefore find, That the defender the Duke of Hamilton, as proprietor of these lands, is to be considered as a joint proprietor, intitled to draw a share in the division, according to the valued rent of these farms; and find him also intitled to a share in the division, according to the valued rent of these farms, which are *in pari casu* with Gilbert Laurie's farm, and which are hereby found intitled to be continued in possession of their respective servitudes, till such time as shares shall be set off to them as aforesaid: And find, That the share to be set off to the Duke of Hamilton shall be burdened with the servitudes due to these farms lying within the barony of Abbotskerse, which are hereby found intitled to servitudes only."

Thus your Lordships will perceive, that it is already established, that those in the first and second class have a right of common property in the commonity in question, effeiring to their respective lands; and that in the division of the commonity, they are intitled to a share thereof, according to the valued rent of their respective lands; and that the Duke of Hamilton in the division, is intitled to draw a share in the commonity, effeiring to the valued rent, not only of his own property lands within the barony, but likewise to the valued rent of the lands of the several feuers stated under the third

third class, who are found to have only rights of servitude; but that the share so to be set off to the Duke of Hamilton is to be burdened with these servitudes; and that the feuers are intitled to be continued in possession of their respective servitudes, till such time as shares shall be set off to them sufficient to answer their servitudes respectively; but it still remains to be determined, how, in what manner, or by what rule, these shares are to be ascertained and set off.

When the cause therefore went back to the Lord Ordinary, it was insisted before his Lordship, on behalf of the now memorialists, that they were intitled to have a share of the commony set off to each of them, sufficient to answer their respective servitudes; so that each of them might possess and enjoy his servitude separately, and not be obliged to continue to possess the same in common, which behoved to be attended with great inconveniences to all parties interested; and it was farther observed for the memorialists, that the only rule by which shares of the commony could be set off to them respectively, for answering their servitudes, was the valued rent of their respective dominant tenements.

These things were stated to the Lord Ordinary in a memorial on behalf of the now memorialists; and no answer having been made thereto upon the part of the Duke of Hamilton, who alone has any interest in the question, his Lordship, upon advising thereof, pronounced the following interlocutor. "And whereas, by the July 13. 1770.

"aforesaid interlocutor of the 30th of July 1768, the Duke of Hamilton is found intitled to a share in the division, according to the valued rent of these farms, holding of him, which are *in pari casu* with Gilbert Laurie's farm; and the said Gilbert Laurie, and other feuers of Duke Hamilton, who are *in pari casu* with him, are found intitled to be continued in possession of their servitudes, till such time as shares of the common shall be set off to them, sufficient to answer their said servitudes; also makes avisandum to the Lords with these questions: 1st, Whether the said feuers can oblige Duke Hamilton to divide that share of the common which shall be allocated to his Grace, so as each feuer may have a share of the common appropriated to him, effecting to his servitude? and, 2^{dly}, In case the feuers can force such division, by what rule the same ought to be made? And ordains parties to lodge memorials on these points," &c.

This memorial is humbly offered in behalf of Mr Laurie and the other feuers who are *in pari casu* with him; and as no opposition

sition has hitherto been made on behalf of the Duke of Hamilton, and not a single argument offered in opposition to what has been suggested on behalf of the memorialists, they propose to trouble your Lordships only with a very few words upon the points stated in the Lord Ordinary's interlocutor.

With respect then to the first point, the memorialists humbly apprehend, that their plea is founded both in the words and spirit of the statute 1695. That statute ordains, " That all common-
 " ties, excepting the commonities belonging to the King and royal
 " boroughs, that is, all that belongs to his Majesty in property,
 " or royal boroughs in burgage, may be divided, *at the instance*
 " *of any having interest*, by summons raised against all persons
 " concerned, before the Lords of Session; who are hereby impower-
 " ed to discuss the relevancy, and to determine upon the rights
 " and interests of all parties concerned, and to value and divide
 " the same according to the *value of the rights and interest of the*
 " *several parties concerned*; and to grant commissions to sheriffs,
 " stewarts, bailies of regality and their deputes, or justices of
 " peace, or others, for perambulating and taking all other necessary
 " probation; which commissions shall be reported to the said
 " Lords, and the said processes ultimately determined by them:
 " and where mosses shall happen to be in the said commonities,
 " with power to the said Lords to divide the said mosses among
 " the several parties having interest therein, in manner foresaid:
 " or in case it be instructed to the said Lords, that the said mosses
 " cannot be conveniently divided, his Majesty, with consent
 " foresaid, statutes and declares, That the said mosses shall remain
 " common, with free ish and entry thereto, whether divided or not;
 " declaring also, That the interest of the heritors having right in
 " the said commonities, shall be estimate according to the valua-
 " tion of their respective lands or properties: and which divisions
 " are appointed to be made of that part of the commonity that is
 " next adjacent to each heritor's property."

It, with submission, cannot be disputed, that it is sufficient to constitute a commonity, that the use of the subject is common, in consequence of servitudes of common pasturage, &c. constituted over it in favour of different persons, though the property of the subject belongs to one person. This is not only agreeable to common and ordinary language, but it is clearly agreeable to the language of the statute 1695. That statute makes an exception of the commonities belonging to the King, which supposes the whole com-
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monty to be the property of the King; and it is plain, that it could only be in virtue of servitudes constituted upon it, that the same was rendered a commonity. And when this statute is general, authorising the division of all commonities, those belonging to the King and royal boroughs alone accepted, it is plain, that this statute authorises the division of a subject, the use of which has been common by the servitudes constituted upon it, though the property belongs to one person only; and as the statute has expressly authorised such divisions to be made *at the instance of any having interest*, it, with submission, seems from thence necessarily to follow, that those having only servitudes have a good title to compel such divisions; although, in the present case, there seems scarce to be room for that question. The Duke of Hamilton, the proprietor, has hitherto given no opposition to the measure, nor is it believed that he will give any opposition, as it is plain and obvious, that such division is greatly for the benefit and interest of all concerned. If this division should not proceed, but the memorialists should be obliged to possess their servitudes in common, over all that part of the muir of the commonity which shall be appropriated to the Duke, it is plain, that all that part of the muir must remain in its present uncultivated state, to the loss of the country in general, and to the great loss and detriment of the parties interested in the commonity.

The memorialists do not pretend to say, That those who have only servitudes of pasturage in a commonity, are intitled to have parts of the property thereof appropriated and set apart to them; but what they humbly contend is, that when they had the superficial use and possession of the subject in common, they are intitled to have the surface divided, that so each of them may enjoy the same severally; reserving to the proprietor any separate right or interest, not falling under the superficial use, such as that of mines and minerals, &c. and that over the whole subject after the division, in the same manner as he was intitled to enjoy it before the division.

And indeed this seems likewise to be clearly founded in the fore-said statute where, it appoints commonities to be divided according to the value of the rights and interests of the several parties concerned; which seems plainly to import, that such as have rights of common property, are to have a share of the property set apart to them effecting to their interest, and that such as have only servitudes or a superficial right in the subject, are to have a share of

the surface set apart to them, effecting to their interest or value of their servitude.

It is extremely clear, that such cases fall under the purview and intendment of the statute. The statute was calculated to prevent that discord which naturally arises from a joint and common possession. Another great object of the statute, was the policy and improvement of the country. Commonities, as long as they were possessed as such, behoved to remain in their natural and uncultivated state, to the great loss of the parties interested as well as of the country in general; and therefore, to put an end to discord, to promote the improvement of the country by cultivation, the planting of woods, and inclosing of ground, the statute has enacted, that it should be in the power of any party interested to force a division, that so each party might be intitled to possess and enjoy his right severally, and to improve it to the best advantage, for his own benefit: And it is plain, that the effect of that beneficial and salutary law would be greatly abridged, if cases such as the present were not comprehended under it.

But it will be unnecessary to trouble your Lordships with more argument, as this very question was most solemnly determined by the court, 3d June 1748, Sir George Stewart *contra* John Mackenzie. In the course of a dispute that had occurred betwixt these two parties, the court directed the parties to argue this question, How far, in a case where there was no common property, but a sole property subject to servitude, the subject could be divided either by common or statute law? And after hearing the cause, "the Lords found, That without prejudice to the property of the several heritors, the surface of the muirs in question might be divided betwixt the parties, according to their several interests in that surface."

That case was precisely similar to the present; and as the division now proposed must be clearly beneficial to all parties concerned, as it would be emulous in any of them to oppose it; so the memorialists are humbly persuaded, that your Lordships will have no difficulty to give the same judgement here that was pronounced in 1748.

With respect to the second question suggested in the Lord Ordinary's interlocutor, viz. By what rule the division ought to be made? The memorialists shall only trouble your Lordships with a very few words, as, in their humble apprehension, it is attended with no sort of difficulty.

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The memorialists will not pretend to maintain, that in every case the same rule is to be adopted in the division of a commony, or part of a commony, amongst those having servitudes of pasturage over it. Such servitudes may receive different modes, whether constituted by express grant, or by prescription; and in sundry cases, the valued rent of the dominant tenements would not be a just rule. In the process of division of the Mearn's muir, it appeared from the proof, that some of the heritors interested in that commony had for time immemorial been limited to the pasturage of a precise number of founs, without any variation. In such a case, the valued rent of the dominant tenement might perhaps be a very improper rule for doing justice to the parties interested. The only rule which in such cases would seem could be followed, would be to give off a share of the commony, effeiring to the real value of such servitude.

But the memorialists do humbly contend, That the valued rent of the respective dominant tenements is the proper and the only rule to be adopted in this case.

Your Lordships will please to attend to the nature of the rights of the parties. The abbots of Holyroodhouse, the sole proprietors of the barony of Kerse, and of the commony in question, the commony of the barony, feued out parcels of these lands, with parts and pertinents; and in 1552, the commendator of that abbacy feued out the whole remaining part of the barony to the Duke of Chastlerault. By which means, the feuers of the abbots had a right of common property in the commony effeiring to their respective lands; and the Duke of Chastlerault had a right of common property in the commony effeiring to the lands feued out to him; so that if a division had been brought betwixt these parties, upon the statute 1695, it is plain, that the property of the whole commony would have fallen to be divided amongst the parties, according to the valued rent of their respective lands.

However, the family of Hamilton being thus proprietors of the whole barony, except in so far as it had been feued out by the abbots, proceeded to grant sundry feus of parcels of the barony. To some of them these lands were granted, with *parts and pertinents*, without making any mention of the commony, which are those in the second class above mentioned; and to others, (which is the case of the memorialists), their lands were granted, "with houses, biggings, yards, mosses, muirs, meadows, tofts, crofts, parts, pendicles, and pertinents, together with the pasturage of cattle, and privilege of com-
" monty,

"monty, within the bounds of the common muir of Reddingrig and Whitefiderig, conform to old use and privilege belonging to the said lands; and all other liberties and commodities used and wont."

As to those in the second class, your Lordships have found, that they have a right of common property effeiring to their respective lands. But as to the memorialists, whose grants are conceived in the terms above recited, your Lordships have found, that they had only servitudes. At the same time, it is extremely clear, from the conception of the foresaid grants, that although they only imported servitudes, yet the whole superficial use of the commony which the family of Hamilton was intitled to in the right of these lands, was by the foresaid grants conveyed to the memorialists predecessors and authors respectively. They, in virtue of these grants, were intitled to a pasturage upon the commony, equal to what the family of Hamilton had enjoyed in the right of these lands. As no more than a servitude upon the commony was thereby given away, the family of Hamilton had no doubt a right and interest in the mines and minerals in the commony effeiring to these lands, as well as to the other lands, the property of which they had reserved. But it is a clear case, that after granting these feus, the Duke of Hamilton could not have put a single hoof more upon the commony, on account of these lands, than he could have done if he had granted to the memorialists a right of common property. In short, the whole superficial use of the commony which the family of Hamilton was intitled to in the right of these lands, was given away to the memorialists predecessors and authors, by the respective feu-rights in their favour.

It cannot be disputed, that if the family of Hamilton had not granted such feus, they would have been intitled in the division to a share of the commony effeiring to the valued rent of these lands; and as the memorialists have, in virtue of these lands, the same superficial interest in the commony that the family of Hamilton had in the right of these lands before the feus were granted, the memorialists must beg leave to consider it as a clear case, that, upon a sound construction of the statute 1695, they are intitled to have a share of the surface allotted to them effeiring to the valued rent of their respective lands, reserving to the Duke of Hamilton a right to the mines and minerals, &c. in the lands so set off.

In respect whereof, &c.

RO. MACQUEEN.